

MARSH ADVANTAGE  
INSURANCE



# INDIVIDUAL FITNESS PROFESSIONAL COMBINED LIABILITY POLICY WORDING

YOUR INSURANCE ADVANTAGE<sup>+</sup>

 MARSH & McLENNAN  
COMPANIES

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## About Marsh Advantage Insurance

Marsh Advantage Insurance (ABN 31 081 358 303, AFSL 238 369) is not the insurer. This policy is underwritten by XL Insurance Company SE, Australia branch (ABN 36 083 570 441). Marsh Advantage Insurance acts under a binding authority on behalf of XL Insurance Company SE, Australia branch and not on your behalf.

# Insuring Agreements Coverage Section A, B & C – General & Products Liability

## 1. Coverage

The Insurer will pay to or on behalf of the Insured all sums which the Insured shall become legally liable to pay by way of damages (which includes amounts owing or liability incurred in respect of or arising out of a claim for recovery or contribution made pursuant to legislation concerning the operation of any statutory compensation scheme) in accordance with the law of any country or assumed under contract or agreement in respect of Personal Injury or Property Damage or Advertising Liability first happening during the Period of Insurance as a result of an Occurrence within the Territorial Limits in connection with the Insured's Business or Product.

## 2. Limit of Liability

The limit of the Insurer's liability in respect of any one Occurrence shall not exceed the Limit of Liability.

The total aggregate liability of the Insurer during the Period of Insurance for all claims arising from the Insured's Product shall not exceed the Limit of Liability for Products Liability.

## 3. Supplementary Payments

With respect to the indemnity afforded by this Policy the Insurer will:

- (a) defend at its own cost in the Insured's name and on the Insured's behalf any suit against the Insured alleging Personal Injury or Property Damage or Advertising Liability and seeking damages on account thereof even if such suit is groundless, false or fraudulent, but the Insurer shall not be obligated to pay any claim or judgement or to defend any suit after the applicable Limit of Liability has been exhausted by payment of judgements or settlements;
- (b) pay all expenses incurred by the Insured, all charges, costs or expenses recoverable from or awarded against the Insured in any such suit and all interest on the entire amount of any judgement therein which accrues after entry of the judgement and before the Insurer has paid or tendered or deposited in court that part of the judgement which does not exceed the limit of the Insurer's liability hereon;

- (c) pay premiums on appeal bonds and/or security for costs required in any such suit and pay premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable Limit of Liability of this Policy, but the Insurer shall have no obligation to apply for or furnish any such bonds and/or security for costs;
- (d) pay all charges, costs or expenses (including actual loss of earnings) incurred by the Insured either at the Insurer's request or with the Insurer's consent or reasonably in the investigation, defence or settlement of any claim or suit;
- (e) pay all legal costs incurred by the Insured with the consent of the Insurer for representation of the Insured at:
  - (i) any coroner's inquest or enquiry or court of criminal justice;
  - (ii) any proceedings in any court in connection with liability insured by this Policy;
  - (iii) any royal commission or government enquiry;
  - (iv) all costs and expenses incidental to the appeal of any judgment referred to in (i) to (iii) above;
- (f) pay all legal costs incurred by the Insured with the consent of the Insurer arising out of the defence of any proceedings in any court arising out of any alleged breach of statutory duty resulting in Personal Injury or Property Damage or Advertising Liability which may be the subject of indemnity under this Policy;
- (g) pay expenses incurred by the Insured for first aid rendered to others arising out of an Occurrence (unless prohibited by law);

The amounts thus incurred are payable by the Insurer in addition to the applicable Limit of Liability of this Policy.

Wherever the Insurer's consent to the Insured incurring an expense or taking a step is required herein, the Insurer's consent must not be unreasonably withheld.

Provided however that, in the event of a claim and/or action instituted against the Insured within the United States of America or Canada, or a claim and action to which the laws of the United States of America or Canada apply and which arise from export of the Insured's Product to or business visits by any director, executive or salesperson to those countries, the Limit of Liability shall apply to such claim and/or action inclusive of all Supplementary Payments.

In jurisdictions where the Insurer may be prevented by law or otherwise from carrying out this provision, the Insurer shall pay any expense incurred with its written consent for others to carry out such actions and payments on its behalf.

# Definitions

The following terms shall have meanings defined below for the purpose of this Policy:

## 1. Advertising Liability

“Advertising Liability” means:

- (a) the publication or utterance of a defamation;
- (b) any infringement of patent, copyright, design, title or slogan;
- (c) any infringement of trademark, service mark or trade name in a title or slogan but only where used on or in connection with goods or services sold, offered for sale or advertised;
- (d) piracy or unfair competition or idea misappropriation under an implied contract;
- (e) any invasion of right of privacy;
- (f) committed or alleged to have been committed and arising out of the Insured’s advertising activities.

## 2. Aircraft

“Aircraft” means any vehicle or thing designed to transport persons or property through the air, atmosphere or space.

## 3. Deductible

“Deductible” means the amount which is payable by the Insured (excluding legal, adjusters and other claim costs) as specified in the Schedule.

## 4. Hovercraft

“Hovercraft” means any vessel, craft or thing made or intended to transport persons or property over land or water supported on a cushion of air.

## 5. Insured

“Insured” wherever used in this Policy means the Insured named in the Schedule and includes:

- (a) any principal, lessor, organization, trustee, estate or person to which or to whom the Insured is obligated by virtue of a written contract to provide insurance as is afforded by this Policy, but only to the extent required by such contract;
- (b) any person or organization with respect to Personal Injury or property Damage or Advertising Liability arising out of the Insured’s Product which are distributed or sold in the regular course of their business as vendor.

Insured does not include the interest of any other person other than as described in this Definition.

## 6. Insurer

“Insurer” wherever used in this Policy means: XL Insurance Company SE, Australia branch.

## 7. Insured’s Product

“Insured’s Product” means anything (after it has ceased to be in the possession or under the control of the Insured) which is manufactured, grown, extracted, produced, processed, assembled, constructed, erected, installed, altered, serviced, repaired, treated, sold, handled, supplied or distributed by the Insured or by others trading under the name of the Insured.

Insured’s Product includes:

- (a) any packaging or containers thereof;
- (b) its design, formula or specifications and directions, instructions or advice given or omitted to be given in connection with such thing;
- (c) any other thing the Insured is deemed to have manufactured in the course of the Business including any discontinued product.

The Insured’s Product shall not include a vending machine or any other property rented to or located for use of others but not sold.

## 8. Limit of Liability

“Limit of Liability” means the applicable limit of liability specified in the Schedule.

## 9. Medical Persons

“Medical Persons” means medical practitioners, medical nurses, dentists and first aid attendants.

## 10. Multiple Damages

“Multiple Damages” shall mean additional damages resulting from the multiplication of compensatory damages against an Insured, such additional damages being awarded as a result of the Insured and/or their legal advisers having engaged in unnecessary delaying tactics or having hindered the due process of the court in some other manner.

## 11. Occurrence

“Occurrence” means an event, including continuous or repeated exposure to substantially the same general conditions which results in Personal Injury and/or Property Damage or Advertising Liability neither expected nor intended from the standpoint of the Insured.

All events of a series consequent on or attributable to one source or original cause will be deemed one Occurrence. With regards to Advertising Liability, all liability arising out of the same injurious material or act regardless of the number or kind of media used, the frequency or repetition thereof and number of claimants shall be deemed to be one Occurrence.

## 12. Personal Injury

“Personal Injury” means:

- (a) bodily injury, death, sickness, disease, disability, shock, fright, mental anguish and mental injury including loss of services, loss of consortium and/or loss of dependency resulting therefrom;
- (b) false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention, malicious prosecution or humiliation, trespass or nuisance;
- (c) assault and battery not committed by or at the direction of the Insured unless committed for the purpose of preventing Personal Injury or Property Damage or eliminating danger to persons or property;
- (d) publication or utterance of a defamation or invasion of the right of privacy;
- (e) discrimination as a result of race, religion, sex, marital status, age, intellectual impairment, disability or otherwise (unless insurance thereof is prohibited by law) not committed by or at the intentional direction of the Insured, but only with respect to liability other than fines and penalties imposed by law.

### 13. Products Liability

“Products Liability” means Personal Injury or Property Damage arising out of the Insured’s Product or reliance upon a representation or warranty made at any time with respect thereto, but only where the Personal Injury or Property Damage occurs away from premises owned or controlled by or leased or rented to the Insured and after physical possession of such Insured’s Product has been relinquished to others.

### 14. Property Damage

“Property Damage” means:

- (a) loss of, physical injury to or destruction of tangible property including the loss of use thereof at any time resulting therefrom. All such loss of use shall be deemed to happen at the time of the physical damage that caused it.
- (b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by physical damage or destruction of other tangible property which first happened during the Period of Insurance. All such loss of use shall be deemed to first happen at the time of the physical damage that caused it.

### 15. Territorial Limits

“Territorial Limits” means anywhere in the world other than the United States of America (USA) or Canada and their respective territories and protectorates where this Policy will only apply in respect of:

- (a) Insured’s Product exported into those countries; or
- (b) the presence in those countries of any director, executive or salesperson but who are non-resident in such countries, and who is not undertaking manual work or supervision of work of any kind whilst in the USA or Canada.

### 16. Vehicle

“Vehicle” means any type of machine on wheels or on caterpillar tracks made or intended to be propelled other than by manual or animal power.

### 17. Watercraft

“Watercraft” means any vessel, craft or thing made or intended to float on or in or travel on or through water.



## **18. Worker**

“Worker” means any person engaged under a contract of service or apprenticeship with the Insured, but does not include a person employed under such contract who is excluded from the definition of ‘worker’ under any Workers’ Compensation Law.

## **19. Workers’ Compensation Law**

“Workers’ Compensation Law” means any law relating to compensation for Personal Injury to a Worker.

## **20. Registered Training Organisation**

“Registered Training Organization” (RTO) shall mean a registered training organization (RTO) that is registered by a state and territory training authority that delivers nationally recognized training that is recognized by all RTOs throughout Australia. It is part of a training package that has been developed to meet the needs of a particular industry and results in a qualification that is part of the Australian Qualifications Framework.

# Exclusions

This insurance does not apply to:

## 1. Advertising Liability

Advertising Liability resulting from:

- (a) failure of performance of contract, but this shall not relate to claims resulting from unauthorised appropriation of ideas based upon alleged breach of an implied contract; or
- (b) incorrect description of any article or commodity; or
- (c) mistake in advertised price.

## 2. Aircraft, Hovercraft and Watercraft

Liability arising out of the ownership, maintenance, operation or use by the Insured of:

- (a) any Aircraft or Hovercraft; or
- (b) any Watercraft

Provided that this Exclusion 2 part (b) shall not apply to Watercraft not exceeding 5 metres in length and then only whilst on inland waterways

## 3. Aircraft Products

Personal Injury or Property Damage arising out of any Insured's Product which is incorporated into the structure, machinery or controls of any Aircraft.

## 4. Asbestos

Personal Injury or Property Damage directly or indirectly caused by or arising from the existence, mining, handling, processing, manufacture, sale, distribution, storage or use of asbestos, asbestos products and/or products containing asbestos.

## 5. Defamation

Liability arising out of the publication or utterance of a defamation:

- (a) made prior to the effective date of this Policy; or
- (b) made at the direction of the Insured with knowledge of the falsity thereof.

## 6. Employers' Liability

Liability for Personal Injury imposed:

- (a) by any Workers' Compensation Law;
- (b) by the provision of any industrial award, agreement or determination or any contract of employment or workplace agreement where such liability would not have been imposed in the absence of such industrial award, agreement or determination or contract of employment or workplace agreement;

Provided that if the Insured:

- (i) is required by law to insure or otherwise fund, whether through self insurance, statutory fund or other statutory scheme, all or part of any common law liability (whether limited or not) for such injury; or
- (ii) is not required to so insure or otherwise fund such liability by reason only that the injury is to a person who is not a worker or employee within the meaning of the relevant Workers Compensation Law or the injury is not an injury which is subject to such Law;

then this Policy will respond to the extent that the Insured's liability would not be covered under any such fund, scheme, policy of insurance or self-insurance arrangement had the Insured complied with its obligations pursuant to such Law;

- (c) any law relating to employment practices, including wrongful or unfair dismissal, discrimination or equal opportunity.

Provided further that this Exclusion 6. shall not apply to the liability of others assumed by the Insured under any contract or agreement.

## 7. Faulty Workmanship / Recall of Product

- (a) Property Damage to any property that must be repaired, reconditioned or replaced by reason of incorrect work performed by the Insured or on the Insured's behalf, or by reason of materials or equipment which are proved to be defective or inadequate in connection with such work, but this Exclusion 7. part (a) does not apply to Personal Injury or Property Damage resulting from such work.
- (b) Damages claimed for any loss, cost or expense incurred by the Insured for the inspection, repair, replacement, loss of use or recall of the Insured's Product if such Insured's Product is withdrawn from the market or from use because of any known or suspected defect or deficiency therein

## **8. Fines, Penalties, Punitive, Exemplary, Multiple Damages**

Fines, or penalties, and/or liquidated, punitive, aggravated, exemplary and/or Multiple Damages imposed by law. Provided however that this Exclusion shall not apply to punitive or exemplary damages awarded in respect of defamation or Advertising Liability.

## **9. Loss of Use**

Loss of use of tangible property which has not been physically injured or destroyed caused by:

- (a) a delay in or lack of performance by or on behalf of the Insured of any contract or agreement; or
- (b) the failure of the Insured's Product to meet the level of performance, quality, fitness or durability expressly or impliedly warranted or represented by the Insured.

Provided that this Exclusion 9. part (b) does not apply to loss of use of other tangible property arising out of the sudden and accidental physical injury to or destruction of the Insured's Product after such Insured's Product has been put to use by any person or organisation other than an Insured.

## **10. Nuclear**

Liability arising directly or indirectly caused by, contributed to, or arising from ionising radiation or contamination by radioactivity from any nuclear waste from the combustion of nuclear fuel or from nuclear weapons material.

## **11. Owned Property / Property in Care, Custody or Control**

Property Damage to:

- (a) property owned by the Insured or any property leased or rented to the Insured to the extent that the Insured has agreed under contract to provide insurance therefor;
- (b) property in the physical or legal control of the Insured, other than:
  - (i) premises (including landlord's fixtures and fittings) which are leased or rented to the Insured; or
  - (ii) premises (including contents thereof) not owned, leased or rented by the Insured but temporarily occupied for work therein or thereon; or
  - (iii) any Vehicle (not owned, leased or hired by the Insured) in the physical or legal control of the Insured where such Property Damage occurs whilst such Vehicle is in a car park owned or operated by the Insured, provided such car park is not owned or operated for reward; or

- (iv) the property (other than a Vehicle) of any director, executive officer or employee of the Insured or of any visitor to the Insured's premises; or
- (v) property (other than property described above) in the physical or legal control of the Insured up to limit as stated in the Schedule

## **12. Pollution**

Personal Injury or Property Damage caused by the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

Provided however that:

- (a) this Exclusion 12. does not apply if such discharge, dispersal, release or escape arises out of a sudden, unexpected and unintended happening which takes place at a specific time and place and occurs outside of the United States of America or Canada;
- (b) expenses for the prevention of such contamination or pollution shall also form part of this Exclusion and shall not be recoverable under this Policy.

Notwithstanding the foregoing, it is specifically declared and agreed that this Exclusion 12. shall not apply to any liability arising out of electromagnetic radiation or electromagnetic fields or to any liability arising out of the discharge, dispersal, release or escape of legionellae bacteria.

## **13. Product Defect**

Property Damage to the Insured's Product if such damage is caused by any defect therein or the harmful nature or unsuitability thereof.

## **14. Professional Liability**

Liability arising from the rendering of or failure to render professional advice or service by the Insured or any error or omission connected therewith.

Provided however that this Exclusion 14. does not apply to:

- (a) Coverage Section D Professional Indemnity
- (b) the rendering of or failure to render professional medical advice by Medical Persons employed by the Insured to provide first aid and other medical services on the Insured's premises.

## 15. Terrorism

Personal Injury or Property Damage directly or indirectly caused by, resulting from or in connection with any Act of Terrorism regardless of any other cause or event contributing concurrently or in any other sequence to such Personal Injury or Property Damage.

For the purpose of this Exclusion Act of Terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), which from its nature or context is done for, or in connection with, political, religious, ideological, ethnic or similar purposes or reasons, including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This Policy also excludes Personal Injury or Property Damage directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any Act of Terrorism.

## 16. Vehicles

- (a) Liability for Personal Injury arising out of the use or ownership by the Insured of any Vehicles in respect of which there is required to be in force a policy of compulsory liability insurance or statutory indemnity for bodily injury.

Provided however that this Exclusion 16. part (a) shall not apply to liability for Personal Injury where compulsory liability insurance or statutory indemnity does not provide indemnity.

- (b) Property Damage arising out of the ownership, maintenance, operation or use by the Insured of any Vehicles being used in circumstances in respect of which there is required to be in force a policy of compulsory liability insurance or statutory indemnity, but this Exclusion 16. part (b) does not apply to:
- (i) the use of any tool or plant forming part of or attached to or used in connection with any Vehicle (excluding whilst the Vehicle is travelling, transporting or carting goods) at any work site;
  - (ii) Property Damage arising out of or in connection with the loading or unloading of or the delivery or collection of goods from any Vehicle;
  - (iii) the Insured's liability arising out of the use by employees or other persons in the course of the Business of any Vehicle not owned, hired, leased or supplied by the Insured and not required to be insured by the Insured by virtue of any legislation governing its use, but excluding the Insured's liability in respect of damage to any such Vehicle;

- (iv) damage to any weighbridge, road or anything beneath caused by the weight of such Vehicle or of the load carried thereon;
- (v) Property Damage caused by or arising from the operation or use of any Vehicle which is designed primarily for lifting, lowering, loading or unloading, whilst being operated or used within the confines of the Insured's premises;
- (vi) Property Damage caused by or arising from the operation or use of any Vehicle (not owned, leased or hired by the Insured) temporarily in the Insured's custody or control for the purpose of parking in a car park owned or operated by the Insured.

### **17. War**

Liability arising directly or indirectly occasioned by, happening through or in consequence of war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power or confiscation or nationalisation or requisition.

### **18. Medical Malpractice Exclusion**

Any liability, claims, costs or expenses arising directly or indirectly, out of or caused by, through or in connection with the rendering of or failure to render any medical service or treatment causing medical malpractice injury.

### **19. Metabolic Drugs / Slimming Products Exclusion**

Any liability, claims, costs or expenses arising directly or indirectly, out of or caused by, through or in connection with the recommendation or sale of metabolic drugs/slimming products.

### **20. Aids and Hepatitis Non A Exclusion**

Any liability, claims, costs or expenses arising directly or indirectly, out of or caused by, through or in connection with Hepatitis Non A or any condition directly or indirectly caused by, or associated with, the human immunodeficiency syndrome (HIV) initially named as either HTLV III or LAV or the mutants, derivatives or variations thereof or in any way related to Acquired Immune Deficiency Syndrome (AIDS) or AIDS related complex (ARC) or any syndrome or condition of a similar kind howsoever it may be named.

## 21. Participant to Participant IRO Contact Sports Exclusion

Liability for any participant for damages or claimant's costs and expenses in respect of respect of injury to any other participant (including referees and officials), caused whilst involved in Contact Sports.

Contact Sports include, but are not limited to:

- Australian Rules Football
- Basketball
- Boxing
- Floorball
- Handball
- Hockey
- Ice Hockey
- Kickboxing
- Lacrosse
- Martial Arts
- Netball
- Rugby League
- Rugby Union
- Soccer
- Sumo
- Water Polo
- Wrestling

## 22. Hazardous Activities Exclusion

Loss, injury, damage, liability or expense arising directly or indirectly out of the following activities:

- Abseiling;
- Backpacking trips;
- BASE jumping;
- Bungee jumping;
- Cage diving;
- Canyoneering;
- Caving;
- Contact sports;
- Hang gliding;
- Helicopter activities;
- Heli-hiking / heli-skiing;
- Horse riding and other equine related tours;
- Hot air balloon rides;
- Hunting;
- Ice climbing;



- Ice fishing;
- Jet boating;
- Moped riding;
- Motorcycle/ATVS;
- Mountain biking;
- Mountaineering;
- Parachuting;
- Paragliding;
- Parasailing;
- Polo playing;
- Quad bikes;
- Racing;
- Rock / top rope climbing / rappelling / zip line / via ferrata;
- Rodeos;
- Scuba diving;
- Skiing; snorkeling;
- Snowboarding;
- Snowmobiles;
- Speed boats;
- Stag and hen parties;
- White water activities (Class 3-5 water);
- Zip wires; or
- Zorbing.
- Trekking
- Hiking
- Overseas Activities outside of Australia and New Zealand.

### **23. Professional Injury Exclusion**

Any claim, loss, damage, liability or costs and expenses incurred directly or indirectly from bodily injury to a professional sports person.

### **24. Abuse Exclusion**

Any claims, costs or expenses arising directly or indirectly out of any alleged sexual abuse, harassment, molestation and or racial discrimination or the consequences thereof.

### **25. Activities Exclusion**

The Insured for any claim arising in connection with

- (a) Activities unconnected with the insured's personal scope of practice and or qualifications from a Registered Training Organization unless specifically agreed
- (b) Any swimming instruction by swim teachers and or coaches

(c) Internet operations including the sale of products unless specifically agreed

## **26. MRSA Exclusion**

The Insured for any Loss, injury, damage, claim or Defence Costs arising out of, alleging or attributable (directly or indirectly) to Methicillin-Resistant Staphylococcus Aureus (MRSA) or any by-product or associated disease therefrom.

## **27. Minors Exclusion**

Any claims, costs or expenses arising directly or indirectly out of working with minors, unless the work has been specifically disclosed and prior agreed by Underwriters in writing. For the purpose of this endorsement, a minor is considered to be any person under the age of 16.

## **28. Electronic Data and Cyber Risk Exclusion**

EXCLUSIONS APPLICABLE TO ALL SECTIONS OF THE POLICY

Any claims, costs or expenses directly or indirectly arising out of, caused by, contributed to or resulting from any:

- (a) Functioning, non-functioning, improperly functioning, availability or unavailability of:
  - (i) The internet or similar facility; or
  - (ii) Any intranet or private network or similar facility; or
  - (iii) Any website, bulletin board, chat room, search engine, portal or similar third party application service
- (b) Alteration, corruption, destruction, distortion, erasure, theft or other loss of or loss of use or damage to DATA, software, information repository, microchip, integrated system or similar device in any computer equipment or non-computer equipment or any kind of programming or instruction set; or
- (c) Loss of use or functionality, whether partial or entire cost, expenses of data, coding, program, software, any computer or computer system or other device dependent upon any microchip or embedded logic and any ensuring inability of any insured to conduct business.

Clauses (a), (b), and (c) apply regardless of any other cause or event contributing concurrently or in any other sequences to the loss.

## 29. Business Entity Exclusion

Liability directly or indirectly arising out of, resulting from or in consequence of any activities undertaken by the Insured whilst acting in any capacity as a Sole Trader, Company, Partnership, Trust or Franchise.

Provided that this Exclusion shall not apply to Sole traders:

- (a) which have not engaged any employees and/or workers;
- (b) for the vicarious liability of sub contractors engaged by the Insured, subject always to:
  - (i) a maximum of 3 sub-contractors engaged by the Insured at any one time; and
  - (ii) sub contractors must have a fully enforceable and current Public & products liability policy with a Professional Indemnity extension.

# Conditions

## 1. Acquisitions of Properties or Companies

Notwithstanding anything contained herein to the contrary the indemnity granted by this Policy extends to properties, assets, companies, firms or other bodies formed or acquired by the Insured or of which the Insured assumes management responsibility and which undertakes activities consistent with the description of the Insured's Business stated in the Schedule. The Insured shall disclose to the Insurer as soon as possible of any new acquisition which represents more than 15% of current group turnover in which event, the Insurer shall be entitled to reasonable additional premium for such acquisition.

Provided that no indemnity shall be granted in respect of claims for Personal Injury and/or Property Damage and/or Advertising Liability:

- (a) which happened prior to the date of such acquisition, formation or assumption of management responsibility; or
- (b) where indemnity is provided by any existing insurance until expiry or cessation of such existing insurance.

## 2. Headings

Headings have been included for ease of reference and it is understood and agreed that the terms and Conditions of this Policy are not to be interpreted by reference to such headings.

## 3. Inspection and Audit

The Insurer shall be permitted, but not obligated, to inspect the Insured's property and operations with reasonable notice. Neither the Insurer's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking on behalf of or for the benefit of the Insured or others to determine or warrant that such property or operations are safe or are in compliance with any law, rule or regulation.

The Insurer may examine and audit the Insured's books and records at any time during the Period of Insurance and extensions thereof and within three years after the final termination of this Policy, as far as they relate to the subject matter of this insurance.

## 4. Insured's Duties

- (a) In the event of an Occurrence the Insured shall promptly take at its own expense all reasonable steps to prevent or minimise Personal Injury or Property Damage or Advertising Liability arising or continuing to arise out of the Occurrence.
- (b) The Insured shall give notice in writing to the Insurer as soon as reasonably practicable of every Occurrence likely to give rise to a claim under this Policy and

shall forward to the Insurer all information relevant to such Occurrence that the Insurer may reasonably require, in particular every demand, writ, summons, proceeding, impending prosecution or inquest.

- (c) The Insured shall not without the Insurer's consent, make any admission, offer, promise or payment in connection with any Occurrence.
- (d) The Insured shall use its best endeavours to preserve all property, any Insured's Product, appliance, plant and all other things which may assist in the investigation or defence of a claim or in the exercise of rights of subrogation and so far as may be reasonably practicable no alteration or repair shall be effected without the consent of the Insurer until the Insurer shall have had the opportunity of inspection.
- (e) The Insured will co-operate with the Insurer and comply with the terms and Conditions of this Policy, and assist as necessary in enforcing any right to contribution or indemnity from any person, corporation or organisation.

## **5. Policy Interpretations**

Where words other than the Insured or the Insurer have been used in this Policy to represent those legal entities, it is agreed that for the purposes of this Policy and any subsequent Endorsements, the words the Insured and the Insurer are deemed to have the same meaning as those alternative words used in this Policy.

It is further agreed that

- (a) words importing persons shall include corporations and other legal entities
- (b) references in the singular shall be deemed to include the plural and vice versa
- (c) words depicting any gender include reference to all other genders
- (d) references to money shall be expressed as Australian dollars, unless otherwise stated.

## **6. Proper Law**

This Policy shall be interpreted in accordance with the laws of Australia and the States or Territories thereof. All disputes arising out of or under this Policy will be subject to determination by any court of competent jurisdiction within Australia.

## **7. Cross Liability**

This Policy, including any amendment, renewal or variation or Endorsement to or of it, shall be construed as if each person or entity entitled to claim on it, whether a party to the contract or not, had made a proposal, application or request for the Policy, or amendment, or renewal, or variation or endorsement, in respect of their interest only. Further any information or knowledge possessed by such person or entity, whether

possessed before or after the contract was entered into, shall not be imputed to any other person or entity.

The Insurer will not seek any relief whatsoever (including cancellation of the Policy) for non-disclosure or misrepresentation or both against a person or entity entitled to claim under this Policy unless the Insurer would have been entitled to that relief had the person or entity claiming been the only person or entity covered by the Policy.

Each person or entity indemnified under this Policy is separately indemnified in respect of claims made against any of them by any other of them, provided that nothing in this clause will operate to increase the Insurer's Limit of Liability.

## **8. Statutory Requirements**

The Insured shall take reasonable measures to comply with all statutory obligations and regulations imposed by any statutory or governmental authority.

## **9. Subrogation**

In the event of payment for loss under this Policy to or on behalf of the Insured, the Insurer shall be subrogated to all the Insured's rights of recovery against all persons and entities.

The Insurer agrees to waive all rights of subrogation under this Policy against any corporation or corporations, the majority of whose capital stock is owned or controlled by the Insured, or against any corporation, firm or person who owns or controls the majority of the capital stock of the Insured, or any person or entity to whom or to which protection is afforded under this Policy except if such corporation, firm, person or entity is protected from such loss by any other policy of indemnity or insurance, and the Insured has not contractually bound to waive any right of subrogation or contribution against such corporation, firm, person or entity.

## **10. Rights of Recourse Endorsement**

It is a condition precedent to liability under this policy that full rights of recourse are maintained against the manufactures / suppliers of all products.

## **11. Cancellation**

This Policy may be cancelled by the Insured at any time by giving notice in writing to the Insurer.

The Insurer may cancel this Policy for any of the reasons set forth in Section 60 of the Commonwealth Insurance Contracts Act 1984 (as amended), such cancellation to take effect sixty (60) days from the time of notification received by the Insured.

In either event, the premium will be adjusted for the time the Policy has been in force and a refund of premium will be allowed pro rata for the unexpired Period of Insurance.

## **12. Premium**

Unless otherwise stated the premium for this Policy or any renewal or replacement thereof is a flat premium and is not subject to adjustment except as provided in **CONDITION 1 - ACQUISITIONS OF PROPERTIES OR COMPANIES** and **CONDITION 11 - CANCELLATION**.

However, where the premium is stated to be adjustable, the Insured shall within a reasonable period after the expiry of each annual Period of Insurance furnish such information as the Insurer may require to adjust the premium, and any difference in premium shall be paid by or allowed to the Insured as the case may be.

## **13. Jurisdiction**

All disputes arising out of or under this policy will be subject to determination by any court of competent jurisdiction within Australia according to the law applicable to the jurisdiction.

## **14. Sub-Contractors**

It is a condition precedent to liability under this policy that all sub-contractors engaged hold their own liability policies in force, covering the activities for which they have been engaged and with a minimum public liability limit of \$10,000,000. It is the responsibility of the Insured to check that such cover is in force.

## **15. Compliance Requirement Endorsement**

It is a requirement under this Policy that the Insured complies with the code of safe practice/rules and regulations relating to their activity as set by the relevant authority.

## **16. Financial Claims Scheme Clause**

This Policy may be a protected Policy under Federal Government's Financial Claims Scheme (FCS), which is administered by APRA. The FCS may apply in the event that a general insurance company becomes insolvent. If the FCS applies a person who is entitled to make a claim under this Policy may be entitled to a payment under the FCS. Access to the FCS is subject to eligibility criteria. You may obtain further information about the FCS from [www.fcs.gov.au](http://www.fcs.gov.au) and the APRA hotline on 1300 55 88 49.

## **17. Sanctions Limitation and Exclusion Clause**

No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union, United Kingdom or United States of America.

# Insuring Agreement Coverage D – Professional Indemnity

## 1. Coverage

The Insurer will indemnify the Insured against civil liability for compensation up to the Limit of Liability from any claim first made against the Insured and notified to the Insurer during the Period of Insurance resulting from the conduct of the Insured's Professional Services as stated in the schedule.

With respect to the indemnity provided by this Policy the Insurer will pay costs and expenses incurred by the Insured or on the Insured's behalf in the investigation, defence or settlement of a claim. The amounts incurred are payable in addition to the Limit of Liability and up to an amount equal to the Limit of Liability.

## 2. Limit of Liability

The limit of the Insurer's liability in respect of any one claim shall not exceed the Limit of Liability specified in the Schedule.

The total aggregate liability of the Insurer during the Period of Insurance for all claims shall not exceed the Aggregate Limit of Liability specified in the Schedule.

## 3. Claims Made Provisions

Coverage Section D of this Policy provides cover on a "claims made" basis. This means that claims first made against the Insured AND reported to the Insurer during the Period of Insurance are covered irrespective of when the act causing the claim occurred, subject to the provisions of the Policy and Schedule.

Please note the effect of Section 40(3) of the Insurance Contracts Act 1984. If the Insured become aware of facts that may give rise to a claim, and give written notice to the Insurer of those facts as soon as possible (and before the Period of Insurance expires), then the Insurer may not deny liability for that claim, when made, solely because it was made after the expiry of the policy period.

For this reason, the Insured must advise the Insurer in writing of all incidents that may give rise to a claim against the Insured without delay after such incidents come to the Insured's attention and before the Period of Insurance expires.



#### **4. Retroactive Date**

Coverage Section D of this Policy provides indemnity in respect of claim(s) arising from acts, errors or omissions committed or alleged to have been committed on or after the Retroactive Date.

The Retroactive Date under this Policy is as stated in the Schedule unless specified otherwise.

#### **5. Deductible**

The deductible amount specified in the Schedule under Coverage Section D is 'Costs Exclusive'.

# Extensions

## 1. Intellectual Property

Indemnity against civil liability arising from any claim for any unintentional infringement of copyright, trademark, patent etc.

## 2. Loss of Documents

Indemnity to the Insured against civil liability arising from any claim for the loss of any documents for which the insured are legally responsible that have been unintentionally damaged, destroyed, etc subject to an annual aggregate sublimit of \$250,000.

## 3. Fines & Penalties

The insurer shall indemnify the Insured in respect of any Claim(s) first made against the Insured during the Policy Period for:

- (a) Penalties imposed on the Insured by a regulatory authority arising from an actual or alleged breach of any occupational health and safety or environmental legislation; and
- (b) Compensatory civil penalties;

Provided that:-

- (a) The action giving rise to the fine or penalty arose out of Professional Services provided by the Insured; and
- (b) The action giving rise to the fine or penalty did not arise from gross negligence or an intentional, wilful, reckless, or deliberate act, error, or omission; and
- (c) Such coverage is permissible under applicable law and regulation.

The maximum amount payable for the Policy Period under this clause in respect of all such claim(s) and Defence Costs in the aggregate shall not exceed AUD\$250,000.

## 4. Official Investigations & Enquiries

Costs & expenses to represent the insured in the investigation or enquiry conducted by a regulatory authority (e.g. Australian Securities & Investments Commission).

## 5. Fidelity Extension

The Insurer shall only provide indemnity to the Insured for loss of money, negotiable instruments, bearer bonds or coupons, stamps, bank or currency notes belonging to the Insured or for which the Insured is legally liable where any such loss is sustained in consequence of a dishonest or fraudulent act or omission by the Insured, provided that:

- (a) The loss is discovered and notified to the Insured in writing by the Insured during the Policy Period;

- (b) The Insurer will not indemnify the person who committed or condoned the dishonest or fraudulent conduct which caused the loss;
- (c) The Insurer will not indemnify any loss sustained in consequence of any act or omission occurring after the date of the discovery of, or the reasonable cause for suspicion of, dishonest or fraudulent conduct of the person concerned;
- (d) The Insured shall bear the burden of proof to substantiate any loss under this extension and the Insured will not be obliged to grant indemnity to the Insured until the Insurer is satisfied that the loss has in fact been sustained;
- (e) The Insured must provide proof that dual controls were in place at the time the loss
- (f) The maximum amount payable for the Policy Period under this clause in respect of all such Claim(s) and Defence Costs in the aggregate shall not exceed AUD \$100,000

**6. Defamation / Libel / Slander**

Indemnity to the Insured against civil liability arising from any claim for any actual or alleged libel, slander or defamation act.

**7. Joint Venture Liability**

Indemnity to the Insured in respect of any claim for the proportion of any legal liability arising out of any professional business in which the Insured is engaged as joint venture.

**8. Australian Consumer Law**

Indemnity to the Insured against civil liability arising from any claim under the Australian Consumer Law or the Competition and Consumer Act 2010 (Cth), or other similar legislation in Australia.

## Exclusions (Only Applicable to Coverage Section D)

This Coverage Section does not indemnify the Insured against any claim or claims arising directly or indirectly out of or in respect of

**1. Products**

the design, specification, formulation, manufacture, construction, installation, sale, supply, distribution, treatment, service, alteration or repair of any goods or products

**2. Employers' Liability**

injury of or to any person in the course of his or her employment by the Insured under any contract of service or apprenticeship or for any breach of any obligation owed by the Insured as an employer to any employee,

**3. Property**

the ownership, possession or use by or on behalf of the Insured of any land, buildings, aircraft, watercraft, vessel or mechanically propelled vehicle,

**4. Insurances**

the failure to ensure that insurances have been effected and maintained,

**5. Infringement of Copyright**

any actual or alleged infringement of copyright, patent, registered design, trade mark or passing-off,

**6. Cross Liability**

or where the claim is made by one Insured or an entity financially associated with the Insured against another Insured, unless the claim originally emanates from an independent third party,

**7. Dishonesty**

any dishonest, fraudulent, criminal or malicious act or omission,

**8. Insolvency or Bankruptcy of Insured**

the administration, receivership, insolvency or bankruptcy of the Insured,

**9. Directors and Officers**

any person acting in their capacity as a director or officer of the Insured or of any firm or company,

**10. USA Office**

any professional business as stated in the Proposal undertaken from an office situated in the United States of America or in any territories which operate under the laws of the United States of America,

### **11. Prior or Pending Claim**

any claim made against the Insured prior to the inception of the Period of Insurance or any claim or circumstance about which the Insured knew or should have known prior the Period of Insurance.

### **12. Licensing**

any act, error or omission committed, attempted or alleged to have been committed or attempted by any Insured or on behalf of any Insured in the conduct of any activity for which such person or entity is not properly licensed, registered or authorized in accordance with any relevant legislation or regulation

### **13. Contractual Liability**

any duty, obligation or liability assumed by the Insured under any contract or agreement.

This exclusion does not apply to any duty, obligation or liability that would attach to the Insured in the absence of such contract or agreement.





**About Marsh:** Marsh Advantage Insurance is a leading provider of insurance broking services for businesses across Australia. Our company is built on a culture dedicated to understanding the risk and insurance needs of local and national businesses that operate in our cities, regions and communities. We are driven by a commitment to deliver industry leading service and value for our clients.

Marsh Advantage Insurance sits alongside Marsh as part of Marsh & McLennan Companies, a global team of professional services firms offering clients advice and solutions in the areas of risk, strategy and human capital.

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